PERDANA PROPERTIES BHD.

v.

YONG CHON

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[ORIGINATING SUMMONS NO. 24-652 OF 1989]
9 NOVEMBER 1989

CIVIL PROCEDURE: *Application for suspension or stay - Foreclosure proceedings - Order for sale and vacant possession - Defendant/applicant refusing to give up vacant possession - Present application by defendant - Inherent jurisdiction of the Court - Order 45 r. 11 Rules of the High Court 1980 - Whether leave has and to be obtained under O. 45 r. 3 - Defendant/applicant further seeking to intervene if order for suspension or stay granted - Whether there was delay in making application - Section 267 of the National Land Code.*

In a foreclosure action, the plaintiff chargee bank obtained an order to foreclose the charged property. Subsequently a public auction was held and the plaintiff agreed to purchase the property at a price of RM139,000. Pursuant to this the plaintiff paid a sum of RM13,900 to the Senior Assistant Registrar being the deposit.

On 24 July 1989, the plaintiff paid the balance of RM125,100.

The defendant applicant however refused to give up vacant possession of the premises. Hence the plaintiff/respondent applied and was granted leave to issue a writ of possession against the defendant and any occupier of the premises.

This is an application by defendant to have the writ of possession suspended and or stayed under the inherent jurisdiction of the Court or under O. 45 r. 11 of the Rules of the High Court 1980 until the determination of relief to which the defendant applicant is entitled and which he is in the process of applying for.

The defendant/applicant contended that they were controlled tenants and that the order for sale and vacant possession could not have the effect of depriving the rent controlled tenants.

Held:

[1] Whether the Court will grant the order of suspension or stay prayed for must depend on the purpose for which it is made, however on the consideration of the facts, the Court is of the view that the applicant cannot apply to intervene.

[2] The order dated 1 March 1989 for the sale of the premises to the respondent was a valid order, and in the absence of any appeal being lodged, it is a valid and good order for execution. The auction sale by the Court was pursuant to that valid order.

[3] The effect of the auction sale under s. 267 of the National Land Code is that the purchaser is issued with a certificate of sale which is registrable.

[4] Since the order or judgment giving possession of the immovable property was by virtue of charge action to which O. 83 applies, there was therefore no necessity for the respondent to have applied for leave to issue a writ of possession. There was no requirement to comply with O. 43 r. 3(3).

[5] Only an application for leave outside the ambit of O. 83 or where O. 83 does not apply that one had to resort to O. 45 r. 3(3) of the Rules of the High Court 1980.

[6] Therefore even under O. 45 r. 3(3) of the Rules of the High Court 1980 or under the inherent jurisdiction of the Court, there is no reason to suspend or stay the writ of possession which was issued by virtue of the fact that the respondent was *bona fide* purchaser at an auction sale where the respondent was clothed with a registrable certificate of sale.

[Application dismissed.]

Cases referred to:
Woo Yew Chee v. Yong Yong Hoo [1979] 1 MLJ 131
Bank Bumiputra Malaysia Bhd. v. Carima Binaan (J) Sdn. Bhd. - O.S. 564/88
Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143
Lim Yoke Foo v. Eu Finance Berhad [1985] 1 MLJ 17
Overseas-Chinese Banking Corpn Ltd. v. Sindoma Realty Sdn. Bhd. [1989] 1 MLJ 377

Legislation referred to:
National Land Code 1965, s. 267
Rules of the High Court 1980, O. 45 r. 3, r. 3(2), r. 3(3), r. 11, O. 83

For the plaintiff - L. Parthiban & Associates; M/s. L. Parthiban & Associates
For the defendant/applicant - Yap Siong Cheng; M/s. Arthur Lee, Yap & Netto

JUDGMENT

Abu Mansor Ali J:

This is an application by the defendant/applicant to have the writ of possession issued in this case suspended and/or stayed under the inherent jurisdiction of the Court or under O. 45 r. 11 of the Rules of the High Court 1980 until the determination of the relief to which the defendant/applicant is entitled and is applying to the Court in action namely, Johore Bahru High Court originating summons no. 564 of 1988 (the foreclosure action). This application for suspension or stay is supported by the applicant's affidavit Encl. (11).

I heard arguments in chambers and after which I reserved judgment to a date to be fixed. My judgment is as follows.

The background facts of this case leading to this application by the defendant are these. In the above foreclosure action, the plaintiff-chargee bank therein obtained an order on 1 March 1989 to foreclose premises No. 158, Jalan Ngee Heng, Johore Bahru (hereinafter called the "said premises").

It transpired that after the order of 1 March 1989 in the foreclosure action there was a public auction of the premises held on 27 May 1989 and the plaintiff herein in originating summons no. 652 of 1989 agreed to purchase at a purchase price of RM139,000 pursuant to which contract of sale the plaintiff paid RM13,900 to the Senior Assistant Registrar being the deposit of the purchase price of the said property. On 24 July 1989 the plaintiff then paid the full balance of the purchase price being RM125,100.

Inspite of the Court order dated 1 March 1989 that the owner or any occupants do give vacant possession of the said premises within 7 days from the date of any sale the defendant/applicant herein refused to give vacant possession and was still occupying. Hence on 18 September 1989 the plaintiff/respondent herein applied *ex parte* for leave to issue a writ of possession against the above-named defendant/applicant. It was supported by an affidavit of the plaintiff's director. On 3 October 1989 the Court granted leave to the plaintiff to issue a writ of possession against the defendant and any occupier of the premises. Then by a summons-in-chambers dated 11 October 1989 the defendant/applicant filed in the Court this present application to have the writ of possession suspended or stayed.

Mr. Yap, Counsel for the applicant said that the applicant are controlled tenants, this fact being disputed by the plaintiff/respondent. They are so since they have been residing there since 1947 and had been paying rental of RM119.60 to Carima Binaan Sdn. Bhd. Applicant annexed the birth certificate of one of his sons who was born in the said premises. Counsel submitted further that it was only on 7 June 1989 that the applicant received the letter of the auctioneers, the letter dated 2 May 1989 "YC2" from which they learned that the premises had been bought by one Law Kueck Shin and that the tenants were asked to deliver vacant possession by the auctioneer's letter. The applicant then instructed their solicitors to write letter "YC3" to inform the auctioneers that they had been staying in the premises for the last 20 years. There was no response and finally on 12 June 1989 the applicant wrote to the plaintiff to say that their rents were being deposited with the solicitors. When there was again no response the applicant wrote personally to the plaintiff "YC6".

Counsel for the applicant submitted that the order for sale and vacant possession of 1 March 1989 could not have the effect of depriving the rent controlled tenants. The only way by which the controlled tenants could be deprived of is by strictly following the provisions of the Rent Control Act.

As far as the writ of possession went, applicant's Counsel submitted the tenants had no knowledge of it except about 10 days ago, the tenants only knew of it when the bailiff attached the premises. He said that under O. 45 r. 3 of the Rules of the High Court 1980, leave has to be obtained. He said no such leave was so obtained.

If an order of suspension or stay is given, the applicant would be applying to Court to intervene in O.S. 564/88 applying to set aside that part of the order dated 1 March 1989 granting possession to the chargee bank.

Applicant's Counsel cited a number of authorities, the effect of which went to show that only a Rent Control Tribunal could grant recovery of possession in accordance with the provisions of the Rent Control Act. Counsel also submitted that under O. 45 r. 3 of the High Court Rules requires that the applicant tenants be made a party. Counsel submitted the procedure under the English Rules would appear to be the same that leave to issue writ for possession will not issue unless the person or persons in actual possession of the land had been served with a notice of the proceedings so as to enable them to apply to the Court for any relief to which he may be entitled. If the defendant is in actual possession, then the affidavit must also state whether the occupier is protected under the Rent Act. Counsel then cited *Woo Yew Chee v. Yong Yong Hoo* [1979] 1 MLJ 131 which decided that though a property was purchased in 1962 it did not cease to be controlled premises and that the character did not change with the coming into force of the Rent Control Act 1966.

The applicant submitted that the order dated 1 March 1989 for possession is therefore bad as the rent controlled tenants had never been served and the tenants were never given the opportunity to state their case.

The applicant therefore prays for a stay order in order that they may apply to intervene in originating summons no. 564/88 and to apply to set aside that part of 1 March 1989 order granting possession to the bank chargee. If it is appropriate the applicant may even consider a separate action. I wish to reiterate may even consider at that stage.

Mr. Parthiban for the respondent confirmed that the respondent had bought and paid for the premises at an auction sale pursuant to the order of Court dated 1 March 1989 whereby the defendant in that foreclosure proceeding was to give the seller vacant possession. All documents in respect of the sale had been executed and the price money had been paid in full.

Subsequent to the purchase of the premises at the sale the respondent applied for leave for the issue of writ of possession and leave was granted on 3 October 1989. The application for leave was made *ex parte* because the present defendant/applicant was not a party to the order obtained on 1 March 1989 (the parties being *Bank Bumiputra Malaysia Bhd. v. Carima Binaan (J) Sdn. Bhd.* - O.S.564/88). The position being that the plaintiff in this present application did not recognise the tenants as tenants or protected tenants under the Rent Control Act. They are in fact illegal occupiers. The auctioneers had served the Court's order of 1 March 1989.

Counsel for the respondent also submitted that there was delay in making this application. If applicant was seriously challenging the order of 1 March 1989 they could have applied in early June 1989. The auction being on 27 May 1989. Instead of challenging or asking to intervene the applicant's solicitors wrote to the respondent's solicitors letter "YC4" Encl. (11) starting that the order not binding on them. Then their solicitors wrote "YC5" and "YC6". They wanted to create the relationship of landlord and tenant. Mr. Parthiban submitted that even at the date of hearing of the applicant's application (21 October 1989) the applicant had not filed any application to intervene, applicant explaining it away by saying it is in the process of being applied for.

On the other hand, the respondent is an innocent purchaser for value whose order was already perfected on 1 March 1989. If the applicant wished to intervene, he submitted that there is no way how it could be done since the order has already been perfected. At this stage, if applicant wish to challenge, they should file a fresh action. As to the application or the intention to have the order of 1 March 1989 set aside, he submitted that there is no power for the Court to set aside its own order. He cited *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 where it was held that the learned Judge had no jurisdiction to set aside an order or vary his own order. Counsel cited *Lim Yoke Foo v. Eu Finance Berhad* [1985] 1 MLJ 17, 20 where the learned Judge cited with approval *Subramaniam v. Muthiah Chetty* in which (i) the Court upheld a sale carried out in purported pursuance of two orders which were bad and which would have been set aside if an appeal were lodged against them. He therefore submitted that the order for sale dated 1 March 1989 would not be the subject of an action. He also cited *Overseas-Chinese banking Corpn. Ltd. v. Sindoma Realty Sdn. Bhd.* [1989] 1 MLJ 377 echoing the same principle.

Lastly the sale to the respondent was by virtue of s. 267 of the National Land Code. Upon the respondent being granted the certificate of sale, the sale shall be registrable and the certificate shall free the purchaser of anymore liability. He submitted the Court should protect a *bona fide* purchaser.

The question for the Court is should the Court grant an order suspending and/or staying the writ of possession issued by it under the inherent jurisdiction of the Court under O. 45 r. 11 of the Rules of the High Court 1980 until the determination of the relief, the applicant said they are entitled to, and is applying to Court in Johore Bahru High Court O.S. 564/1988 (foreclosure action)?

Whether the Court will grant the order of suspension or stay prayed for must depend on the purpose for which it is made i.e., to enable the applicant to apply to intervene in the foreclosure action and also to a large extent depend on the likely success of such a step. After considering these factors, I am of the firm view that the applicant cannot apply to intervene and if they did, on the authorities current the application is bound to fail. Hence I exercised my discretion to dismiss the application.

As was quite rightly pointed out by the Counsel for the respondent, there was inordinate delay. The applicant came to know about this foreclosure on 2 June 1989 but he did not take any positive step. His Counsel's letter filing this application was dated 11 October 1989.

The order dated 1 March 1989 for the sale of the premises to the respondent was a valid order and in the absence of any appeal being lodged *prima facie*, it is a valid and good order for execution. The auction sale by the Court was pursuant to that valid order. I agree with the respondent's Counsel's submission as to the effect of auction sale under s. 267 of the National Land Code. The purchaser is issued with a certificate of sale which is registrable.

As to the applicant's contention that under O. 45 r. 3 of the High Court Rules 1980, the writ should not have been issued as it is not being in accordance with that order, I am of the view there is no substance in that submission. Order 45 r. 3 provides:

> 3.(1) Subject to the provisions of these rules, a judgment or order for the giving of possession of immovable property may be enforced by one or more of the following means, that is to say:
>
> (a) writ of possession;
>
> (b) in a case in which r. 5 applies, an order of committal.
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> (2) A writ of possession to enforce a judgment or order for the giving of possession of any immovable property shall not be issued without the leave of the Court except where the judgment or order was given or made in a charge action to which O. 83 applies.
>
> (3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

It is the contention of the applicant that that order of Court dated 3 October 1989 granting leave was bad because it was *ex parte* and the applicant who is alleged to be tenant was not served. On my reading of O. 45 r. 3(2) of the High Court Rules 1980, I am of the view that since the judgment or order giving possession of the immovable property (the premises) was by virtue of charge action to which O. 83 applies there was therefore no necessity for the respondent to have applied for leave to issue a writ of possession. I am of the view since that is the case, the requirement of O. 45 r. 3(3) was not required to be complied with. It was only an application for leave outside the ambit of O. 83 or where O. 83 does not apply that one had to resort to O. 45 r. 3.

I therefore hold that even under O. 45 r. 3, or under the inherent jurisdiction of the Court I find that there is no reason for me to suspend or stay the writ of possession which was issued by virtue of the fact that the respondent was a *bona fide* purchaser at an auction sale where the respondent was clothed with a registrable certificate of sale. On this ground that respondent was *bona fide* purchaser, I dismiss the applicant's application with costs to be taxed.

Also found at [1990] 1 CLJ 538